IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JON MICHAEL MULLINS,
Appellant.

No. 2 CA-CR 2018-0069
Filed November 28, 2018

Appeal from the Superior Court in Pima County
No. CR20074781
The Honorable Deborah Bernini, Judge

AFFIRMED IN PART;
VACATED IN PART

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Vásquez and Judge Eppich concurred.

E S P I N O S A, Judge:

¶1 Jon Mullins [1] appeals his convictions and sentences for transportation of marijuana for sale and possession of marijuana for sale. For the following reasons, we affirm Mullins's transportation conviction and sentence but vacate the possession conviction as a lesser-included offense.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the convictions. *State v. Hamblin*, 217 Ariz. 481, ¶ 2 (App. 2008). In December 2007, Mullins was driving on Interstate 10 when he was pulled over by a Department of Public Safety (DPS) highway patrolman for a traffic violation. After the officer had Mullins step out of the vehicle, he "briefly smelled the odor of raw marijuana." The officer then brought a drug-detection dog to the vehicle and it alerted to the trunk. Inside were numerous "yellow packages" containing marijuana—in all, twenty-six bales weighing over 125 pounds.

¶3 Mullins was charged with unlawful transportation of marijuana for sale and unlawful possession of marijuana for sale.[2] He was released on bond, and after he failed to appear at a March 2008 case management conference, the trial court issued an arrest warrant. Fifteen months later, he was arrested and again released on bond. When he again failed to appear at a July 2009 case management conference without contacting his attorney, the court found he had been given appropriate

[1]Throughout his trial, Mullins used the false identity "Jeffrey Scott Ellsworth." It was not until July 2017 that his true name was disclosed to the court and a booking name change was ordered.

[2]Mullins was also indicted on one count of possession of drug paraphernalia, which the state ultimately dropped before trial.

notification that the trial could proceed in his absence and set the matter for trial.

¶4 During Mullins's trial in absentia, the state called a DPS detective to testify. On direct examination, the prosecutor asked the detective about his training and experience in the "illegal narcotics and drug trade" and asked the trial court to "qualif[y him] as an expert in this case." The court responded by saying "you may continue," and the questioning resumed. The detective testified that, based on his training and experience, 125 pounds of marijuana was not "how much somebody would have for personal use." In closing argument, defense counsel challenged the detective's credibility, asserting that just because "he's attended some seminars" it "doesn't make [him] an expert." In response, the prosecutor stated "the [c]ourt qualified him as an expert" so it "certainly thought he was."

¶5 Also, in his closing argument, the prosecutor asserted Mullins was "part of the drug problem that plagues southern Arizona" and that there "are drug cartels that are killing" people. Defense counsel objected, stating "no evidence [was] presented that he was part of a cartel and he's killing people"; the trial court sustained the objection.

¶6 Before allowing the jury to deliberate, the trial court gave an ad hoc instruction, advising "it is not appropriate to base a verdict on passion or prejudice," noting that was something both attorneys had appealed to during their closings. The court also instructed that anything "[the court] may have done during this case permitting expert testimony was something permitted under the rules." Finally, the court instructed the jury it was "not bound by that testimony any more because of anything [the court] did" during trial. After the jury retired to deliberate, Mullins moved for a mistrial based on the prosecutor's "drug cartel" comment. The court denied the motion, and the jury found Mullins guilty of both charges.

¶7 Mullins remained at large until he was arrested again in July 2017. He filed a motion for new trial in November 2017, before judgment and sentencing, claiming he had not appeared because he "needed to help [his wife] relocate" to Mexico after she was deported and then "felt that he needed to remain in Mexico to protect his family." He also claimed he was hospitalized following a carjacking that left both of his legs broken and even after his discharge he "was still unable to go to his trial because he was recovering." In an affidavit filed in support of the motion, Mullins's wife

claimed she had "attempted to obtain the medical records from the Nogales, Mexico hospital" but was told the records had been destroyed.

¶8 The trial court denied the motion, finding Mullins "failed in his burden to show that his absence at trial was involuntary." The court noted that Mullins had given a "fictitious address at his initial appearance," "voluntarily chose to convalesce in Mexico rather than attend trial," "voluntarily failed to maintain contact with his attorney," and had signed multiple court documents advising him of his duty to appear and notifying him he could be tried in absentia.

¶9 In February 2018, Mullins was sentenced to four-year prison terms for each charge, to be served concurrently. He filed this appeal, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Absence from Trial

¶10 Mullins first argues the trial court erred in finding he "was voluntarily absent when he presented evidence that he had been in a hospital in Mexico at the time of the trial." To the extent Mullins challenges the court's denial of his motion for a new trial, as recognized by the state, the court lacked jurisdiction to address the issue, as do we. Such a motion must be filed "no later than 10 days after return of the verdict being challenged"; the "deadline is jurisdictional and the court may not extend it." Ariz. R. Crim. P. 24.1(b). Thus, a trial court has no jurisdiction to consider an untimely motion filed pursuant to Rule 24.1. *State v. Hickle*, 129 Ariz. 330, 332 (1981). And because appellate jurisdiction is derivative, where a trial court lacked jurisdiction to consider a motion, we lack jurisdiction to address the propriety of such a ruling on appeal. *Webb v. Charles*, 125 Ariz. 558, 565 (App. 1980).

¶11 Mullins nevertheless argues that because this court "has the record and the issue will otherwise be raised in a petition for post-conviction relief," "it is more reasonable to treat [his motion for new trial] as a motion to vacate judgment" pursuant to Rule 24.2, Ariz. R. Crim. P. We decline his invitation and would nevertheless still lack jurisdiction because Mullins filed his motion before the entry of judgment. Rule 24.2(b) requires that a defendant file a motion to vacate judgment "no later than 60 days after the entry of judgment and sentence," but a defendant may not proceed under Rule 24.2 when "a judgment of conviction and sentence ha[s] not yet been entered." *State v. Saenz*, 197 Ariz. 487, ¶ 6 (App. 2000). Again,

where a trial court lacks jurisdiction to hear or consider a premature motion to vacate judgment under Rule 24.2, *Hickle*, 129 Ariz. at 332, we too lack jurisdiction to consider the denial of that motion on appeal, *Webb*, 125 Ariz. at 565.

¶12 To the extent Mullins generally challenges on appeal the fact that trial was held in his absence, we address that issue, but we do so without regard to the arguments presented in his untimely motion and supporting documentation attached to it. Rather, we consider only whether the trial court erred in finding Mullins had voluntarily absented himself and permitting the case to proceed, given the information before the court at that time. Although the Sixth Amendment establishes a defendant's right to be present at trial, a defendant may "voluntarily relinquish" that right. *State v. Reed*, 196 Ariz. 37, ¶ 3 (App. 1999) (quoting *State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 9 (1998)). Because a court's "finding of voluntary absence, and, therefore, the existence of a waiver of the right to be present, is basically a question of fact," we review for an abuse of discretion. *State v. Bishop*, 139 Ariz. 567, 569 (1984) (quoting *Brewer v. Raines*, 670 F.2d 117, 120 (9th Cir. 1982)).

¶13 Rule 9.1, Ariz. R. Crim. P., provides that "a defendant's voluntary absence waives the right to be present" at trial. Further, if a defendant had "personal notice of the time of the proceeding, his right to be present at it, and a warning that the proceeding would go forward in his absence, 'the trial court may presume the absence is voluntary and the burden is on the defendant to demonstrate otherwise.'" *State v. Suniga*, 145 Ariz. 389, 392 (App. 1985) (quoting *State v. Fristoe*, 135 Ariz. 25, 34 (App. 1982)). It is within the trial court's discretion whether to credit any evidence presented that would rebut the presumption of involuntary absence. *Id.* (insufficiency of defendant's proffered excuses supported inference of voluntary absence).

¶14 Here, Mullins was advised on several occasions that his trial could proceed without him in the event he failed to appear. To the extent he may have been unaware of his actual trial date, this was only because he failed to appear at his pretrial case management conference and failed to communicate with his attorney, as was his duty. *See Bishop*, 139 Ariz. at 571 ("An out-of-custody defendant has the responsibility to remain in contact with his attorney and the court."). And, although the trial court did not make an explicit finding of voluntary absence, such a finding is not required. *Suniga*, 145 Ariz. at 391-92. The court had no obligation to find

his absence anything other than voluntary, and we see no abuse of its discretion. *Id*.

Prosecutorial Misconduct

¶15 Mullins next argues his convictions should be reversed because "in closing, the prosecutor raised the issue of the violence of drug cartels" and "argued that the jury should dismiss the defense's arguments against [the state's] expert's testimony because the trial court had found that it was valid." To prevail on a prosecutorial misconduct claim, Mullins must show that "misconduct [was] indeed present" and that "a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying [him] a fair trial." *State v. Moody*, 208 Ariz. 424, ¶ 145 (2004).

¶16 We review each claim of prosecutorial misconduct individually to determine whether any error occurred. *State v. Roque*, 213 Ariz. 193, ¶ 154 (2006), *abrogated on other grounds by State v. Escalante-Orozco*, 241 Ariz. 254 (2017). In doing so, we must consider whether each instance was objected to at trial to determine our standard of review. *Id*. If defense counsel objected, the issue is preserved and we review for harmless error, but if there was no objection, we are limited to fundamental error review. *State v. Hulsey*, 243 Ariz. 367, ¶ 88 (2018).

a. Reference to Drug Cartels

¶17 Mullins preserved his first claim of misconduct, the state's reference to "drug cartels that are killing" people, by objecting at trial. Mullins also raised the issue when requesting a mistrial. We review this claim for harmless error, finding harmlessness only if we determine "beyond a reasonable doubt that it did not contribute to or affect the verdict." *Roque*, 213 Ariz. 193, ¶ 152 (quoting *State v. Hughes*, 193 Ariz. 72, ¶ 32 (1998)). We review the court's denial of a mistral motion for an abuse of discretion. *See State v. Newell*, 212 Ariz. 389, ¶ 61 (2006).

¶18 The prosecutor's comment was improper as it was not supported by any evidence. *See State v. Corona*, 188 Ariz. 85, 89 (App. 1997) ("[C]losing arguments must be based on facts that the jury is entitled to find from the evidence and not on extraneous matters not received in evidence."). The jury, however, was instructed that it was required to "find the facts from the evidence," and that in closing arguments "what the lawyers say is not evidence." Further, the trial court directed that evidence "does not include objections which are sustained," as was the case here, and

it cautioned the jury against "bas[ing] a verdict on passion or prejudice." Given the court's specifically tailored instructions, and the presumption that jurors follow their instructions, *State v. Ramos*, 235 Ariz. 230, ¶ 30 (App. 2014), we conclude the prosecutor's improper comment was harmless beyond a reasonable doubt and the court was within its discretion in denying a new trial on this basis. *See Roque*, 213 Ariz. 193, ¶ 152.

b. Comment on Expert Witness

¶19 Mullins further argues "the prosecutor [telling] the jury that it should ignore the defense criticism of its expert because the trial judge had found that he was an expert" was similar to "improper prosecutorial vouching." He did not object to this comment or raise it in his mistrial motion; we are thus limited to fundamental error review.[3] *State v. Escalante*, 245 Ariz. 135, ¶ 1 (2018). We must first determine whether error exists and then decide whether it is fundamental based on the totality of the circumstances. *Id*. ¶ 21. Fundamental error "goes to the foundation of the defendant's case, takes away a right essential to the defense, or is of such magnitude that it denied the defendant a fair trial." *Id*. ¶ 1. Further, to "warrant reversal, the defendant must then show prejudice" but "if the trial is found to have been unfair, prejudice is automatically established, and no further showing is required." *Id*.

¶20 Improper prosecutorial vouching occurs when a prosecutor either "plac[es] the prestige of the government behind a witness" or "suggests that additional unrevealed evidence supports a guilty verdict." *State v. Palmer*, 219 Ariz. 451, ¶ 6 (App. 2008). While Mullins plausibly argues the comment represented an attempt at the former by utilizing the prestige of the court, it was clearly improper because it was not supported by facts. When asked, in the presence of the jury, to qualify the witness "as an expert in this case," the trial court responded by simply saying "you may continue." Although attorneys are given "[w]ide latitude" in closing

[3] Mullins does not argue the prosecutor's statements constitute fundamental error, which generally waives the claim on review. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008). In our discretion, however, because this comment was also improper, and, indeed, the trial court specifically referred to it in admonishing both counsel at the close of the trial, we choose to address the claim on its merits. *See State v. Smith*, 203 Ariz. 75, ¶ 12 (2002) (reviewing court may choose to address argument otherwise waived).

arguments, they still are confined to "facts the jury is entitled to find from the evidence and not on extraneous matters that were not or could not be received in evidence." *State v. Dumaine*, 162 Ariz. 392, 402 (1989), *disapproved on other grounds by State v. King*, 225 Ariz. 87 (2010).

¶21 It cannot be said, however, that this error was fundamental. *Escalante*, 245 Ariz. 135, ¶ 21. As referred to earlier, the trial court, in an improvised instruction following closing arguments, advised the jury:

> As I've already told you, it is not appropriate to base a verdict on passion or prejudice. Both attorneys in this matter have made arguments that have made those appeals. Please do not do that. I need you to go back and decide the facts and apply the law and that's how you're going to reach your verdict. To the extent that there was any expert testimony in this case I need to make clear to all of you it is up to you what to accept and what to reject. Anything that I may have done during this case permitting expert testimony was something permitted under the rules. And you are not bound by that testimony any more because of anything I did during this case.

As previously noted, jurors are presumed to follow their instructions, *Ramos*, 235 Ariz. 230, ¶ 30, and given the brief and isolated nature of the improper comment, it was not so egregious it could not be rendered innocuous by the court's affirmative and focused directive. *State v. Gallardo*, 225 Ariz. 560, ¶ 42 (2010) (curative instructions may negate prejudicial effect of improper statements).

¶22 Finally, notwithstanding that the expert witness comment was not raised in his motion for mistrial, Mullins contends that that comment, together with the objected to improper drug cartel statements, justified a mistrial. He argues that because the trial court referred to both comments in its curative instruction to the jury and when it admonished both counsel, it was fundamental error to deny his motion. But even accepting this argument at face value, we disagree. Because the trial court is "in the best position to determine the effect of a prosecutor's comments on a jury," it is given considerable discretion in denying a motion for mistrial. *Newell*, 212 Ariz. 389, ¶ 61. Here, the court witnessed the

comments, implicitly considered them, and fashioned specific jury instructions to negate any prejudicial effect, all before denying Mullins's motion for mistrial. We again presume those instructions were followed, *Ramos*, 235 Ariz. 230, ¶ 30, and we conclude the two unrelated instances of misconduct did not affect the jury's deliberations and there was no error in the trial court's ruling, *Gallardo*, 225 Ariz. 560, ¶ 42.

Double Jeopardy

¶23 In its answering brief, the state correctly notes that Mullins's conviction for possession of marijuana for sale must be vacated. Because "the charged possession for sale is incidental to the charged transportation for sale, it is a lesser-included offense." *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 12 (App. 1998). When multiple convictions are improperly based on a single act, the lesser-included conviction cannot stand. *See State v. Nereim*, 234 Ariz. 105, ¶ 25 (App. 2014); *State v. Jones*, 185 Ariz. 403, 407 (App. 1995).

Disposition

¶24 For the foregoing reasons, Mullins's conviction and sentence for transportation of marijuana for sale is affirmed, but his conviction and sentence for possession of marijuana for sale is vacated.